

January 8, 2010

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Alternative Draft C ADVISORY OPINION 2009-27 is available for public comments under this procedure. It was requested by Jason Torchinsky on behalf of the American Future Fund Political Action.

Alternative Draft C Advisory Opinion 2009-27 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 14, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm (Eastern Time) on January 13, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Judith Ingram (202) 694-1220

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Other inquiries:

To obtain copies of documents related to AO 2009-27, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

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(Supersedes No. 10-01-A)



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January 8, 2010

**AGENDA ITEM**  
For Meeting of: 1-14-10

**MEMORANDUM**

**SUBMITTED LATE**

TO: The Commission

FROM: Thomasenia P. Duncan *pch/pu*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK/NFS*  
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Anthony T. Buckley *ATB/NFS*  
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Attorney

Subject: Draft C AO 2009-27 (American Future Fund Political Action)

We have been asked to circulate the attached draft of the subject advisory opinion.  
Please place this draft on the agenda for January 14, 2010.

Attachment

1    **ADVISORY OPINION 2009-27**

2    Jason Torchinsky, Esq.  
3    Holtzman Vogel PLLC  
45 North Hill Drive  
Suite 100  
Warrenton, VA 20186

**DRAFT C**

4    Dear Mr. Torchinsky:

5        We are responding to your advisory opinion request on behalf of American Future  
6    Fund Political Action ("American Future Fund"), concerning the possible preemption of  
7    the State laws of fifteen States by the Federal Election Campaign Act of 1971, as  
8    amended ("the Act"), and Commission regulations. The Commission concludes that: (1)  
9    the State laws purporting to prohibit all pre-recorded telephone calls by Federal political  
10   committees are preempted by FECA; (2) the State laws requiring Federal political  
11   committees to obtain prior consent, specifically through the use of a live operator, prior to  
12   delivery of a pre-recorded telephone call are preempted by FECA; (3) the Iowa State law  
13   purporting to prohibit Federal political committees from engaging in fundraising via pre-  
14   recorded telephone calls is preempted by FECA; and (4) the State laws purporting to  
15   require Federal political committees to include additional disclaimers on pre-recorded  
16   telephone calls are preempted by FECA.

17    ***Background***

18        The facts presented in this advisory opinion are based on your letters received on  
19    October 13, 21, and 29, 2009, and publicly available materials, including reports filed  
20    with the Commission.<sup>1</sup>

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<sup>1</sup> See FEC Form 1, Statement of Organization, available at  
<http://query.nictusa.com/pdf/381/28039722381/28039722381.pdf#navpancs=0>.

1 American Future Fund is a non-connected multicandidate committee registered  
2 with the Commission. As a Federal political committee, American Future Fund may only  
3 accept contributions that are subject to the Act's limitations and prohibitions. 2 U.S.C.  
4 441a(f). American Future Fund makes expenditures with funds that have been raised  
5 subject to the Act's limitations and prohibitions. *Id.*

6 American Future Fund proposes to distribute pre-recorded telephone calls,  
7 through the use of what is known as automatic dialing answering devices ("ADAD"), as  
8 part of a nationwide program of political outreach. American Future Fund's telephone  
9 calls will expressly advocate the election or defeat of one or more clearly identified  
10 candidates for Federal office, and/or solicit contributions to American Future Fund.  
11 American Future Fund's phone calls will be developed and distributed independent of  
12 any Federal candidate, authorized committee, or party committee, and will not be  
13 authorized by any Federal candidate.

14 American Future Fund's telephone calls will constitute a "telephone bank to the  
15 general public" and "public communications," as those terms are defined in the Act and  
16 Commission regulations. *See* 2 U.S.C. 431(22) and (24); 11 CFR 100.26 and 100.28. A  
17 telephone bank is a type of public communication that must include the disclaimers  
18 required by the Act. *Id.* American Future Fund's telephone calls may also constitute  
19 "independent expenditures," as that term is defined in the Act and Commission  
20 regulations. *See* 2 U.S.C. 431(17) and 11 CFR 100.16(a). American Future Fund's  
21 telephone calls will comply with applicable disclaimer requirements. *See* 2 U.S.C.  
22 441d(a)(3); *see also* 11 CFR 110.11(a)(1)-(3) (requiring disclaimers on public  
23 communications generally made by political committees, public communications by any

1 person expressly advocating the election or defeat of a clearly identified Federal  
2 candidate, and public communications by any person that solicit any contribution).

3 American Future Fund's telephone banks will reach into fifteen States that  
4 prohibit or otherwise restrict telephone bank calls. Two states ban ADAD calls outright.<sup>2</sup>  
5 Ten states require prior consent obtained by live operators.<sup>3</sup> One state, Iowa, prohibits  
6 ADAD calls except for nonprofit fundraising. See Iowa Code 476.57. Two states that  
7 require prior consent by operators also require certain disclaimers on ADAD calls.<sup>4</sup> Two  
8 other states only require certain disclaimers on ADAD calls.<sup>5</sup>

9 ***Questions Presented***

- 10 1. *Are certain State laws purporting to prohibit all pre-recorded*  
11 *telephone calls by Federal political committees preempted by FECA?*  
12  
13 2. *Are certain State laws requiring Federal political committees to obtain*  
14 *prior consent, specifically through the use of a live operator, prior to*  
15 *delivery of a pre-recorded telephone call preempted by FECA?*  
16  
17 3. *Is Iowa State law purporting to prohibit Federal political committees*  
18 *from engaging in fundraising via pre-recorded telephone calls*  
19 *preempted by FECA?*  
20  
21 4. *Are certain State laws purporting to require Federal political*  
22 *committees to include additional disclaimers on pre-recorded*  
23 *telephone calls preempted by FECA?*  
24

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<sup>2</sup> These states are Arkansas and Wyoming. See Ark. Code § 5-63-204(a)(1) and Wyo. Stat. § 6-6-104(a).

<sup>3</sup> These states are California, Indiana, Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee. See Cal. Pub. Util. Code 2872 – 2874; Ind. Code 24-5-14-5, 24-5-14-7; Minn. Stat. 325E.27, 325E.29; Miss. Code 77-3-455; Mont. Code 45-8-216; N.J. Stat 48:17-28; N.C. Gen. Stat. 75-104(b)(2); N.D. Code 51-28-02 – 51-28-04; S.C. Code 16-17-446; Tenn. Code 47-18-1502.

<sup>4</sup> These states are California and Mississippi. See Cal. Pub. Util. Code 2872; Miss. Code 77-3-455.

<sup>5</sup> These states are New York and Pennsylvania. See N.Y. Gen. Bus. 399-p; 52 Pa. [Admin.] Code 63.60.

1    ***Legal Analysis and Conclusions***

2           The Act states that its provisions and the rules prescribed thereunder “supersede  
3   and preempt any provision of State law with respect to election to Federal office.”  
4   2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress  
5   intended “to make certain that the Federal law is construed to occupy the field with  
6   respect to elections to Federal office and that the Federal law will be the sole authority  
7   under which such elections will be regulated.” *H.R. Rep. No. 93-1239*, 93d Cong.,  
8   2d Sess. 10 (1974). According to the Conference Committee Report on the 1974  
9   Amendments to the Act, “Federal law occupies the field with respect to criminal  
10   sanctions relating to limitations on campaign expenditures, the sources of campaign funds  
11   used in Federal races, the conduct of Federal campaigns, and similar offenses, but does  
12   not affect the States’ rights” as to other areas such as voter fraud and ballot theft. *H.R.*  
13   *Rep. No. 93-1438*, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report  
14   also states that Federal law occupies the field with respect to reporting and disclosure of  
15   political contributions to, and expenditures by, Federal candidates and political  
16   committees, but does not affect State laws as to the manner of qualifying as a candidate,  
17   or the dates and places of elections. *Id.* at 100-101.

18           In promulgating 11 CFR 108.7, the Commission stated specifically that Federal  
19   law supersedes State law with respect to the organization and registration of political  
20   committees supporting Federal candidates, disclosure of receipts and expenditures by  
21   Federal candidates and political committees, and the limitations on contributions and  
22   expenditures regarding Federal candidates and political committees. *Explanation and*  
23   *Justification of the Disclosure Regulations*, House Document No. 95-44, at 51 (1977).

1 Section 108.7 also specifies that the Act does not supersede State laws relating to the  
2 manner of qualifying as a candidate or political party organization, dates and places of  
3 elections, voter registration, voting fraud, ballot theft, candidates' personal financial  
4 disclosures, or funds used for the purchase or construction of State or local party office  
5 building. 11 CFR 108.7(c). The Commission has previously stated that the legislative  
6 history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a  
7 comprehensive, uniform Federal scheme that is the sole source of regulation of campaign  
8 financing . . . for election to Federal office." Advisory Opinion 1988-21 (Wieder).

9 In addition, 2 U.S.C. 453 and 11 CFR 108.7 do not limit the Act's preemption of  
10 state laws to only those laws focusing exclusively on elections and political activity.

11 Thus, the Commission has concluded that certain other areas of law, if affecting Federal  
12 elections, may be preempted by the Act. See Advisory Opinion 1981-27 (Archer)  
13 (concluding that a city ordinance requiring the inclusion of an anti-littering warning was  
14 preempted as applied to Federal campaign materials); Advisory Opinion 1999-12  
15 (Campaign for Working Families) (concluding that a state provision requiring the  
16 inclusion of certain disclaimers about the nature of charitable solicitations through the  
17 mail was preempted as applied to a Federal political committee).<sup>6</sup>

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<sup>6</sup> The Commission has received a number of comments on this advisory opinion request. Comments from several State agencies argue that the Commission should conform its conclusion as to whether the FECA preempts State laws to the finding by some courts that the Telephone Consumer Protection Act ("TCPA") does not preempt state restrictions on ADAD usage. See *Van Bergen v. State of Minnesota*, 59 F.3d 1541, 1547-48 (8th Cir. 1995) (concluding that the TCPA does not expressly preempt State law); *Stenehjem v. Freeeats.com, Inc.*, 712 N.W.2d 828, 837 (N.D. 2006) ("There is no provision in the TCPA which explicitly states that the federal statute was intended to preempt state laws prohibiting certain classes of interstate calls.").

The preemption clause at issue in those cases, however, stated that the federal law *did not* explicitly preempt state law, except under limited circumstances. 47 U.S.C. § 227 ("Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that



**1. Are certain State laws purporting to prohibit all pre-recorded telephone calls by Federal political committees preempted by FECA?**

Yes, the laws of Arkansas and Wyoming purporting to prohibit pre-recorded telephone calls made by Federal political committees are preempted by FECA.

The Act and Commission regulations establish that limitations and restrictions on Federal political committees' expenditures is an area to be regulated solely by Federal law. The Act specifically addresses expenditures by Federal political committees. *See, e.g., 2 U.S.C. 431(9).*

Ark. Code § 5-63-204(a)(1) states “It is unlawful for any person to use a telephone . . . for any other purpose in connection with a political campaign when the use involves an [ADAD].” Although the term “political campaign” is not defined by the Arkansas Code, that term appears to have been used broadly by the Arkansas legislature when it prohibited the involvement of charitable organizations in “*any* political campaign on behalf of or in opposition to *any* candidate for public office.” Ark. Code 26-51-303 (emphasis added). The term “political campaign” appears to apply to both Federal and State or local campaigns because it relates to any “public office,” including Federal office.

Wyo. Stat. § 6-6-104(a) states “No person shall use an [ADAD] . . . for purposes of . . . [p]romoting or any other use related to a political campaign.” Wyoming’s law, appears to include all political campaigns, including those conducted by a Federal

imposes more restrictive requirements or regulations on, . . .”); *see also* *Van Bergen v. State*, 59 F.3d at 1547 (“the statute includes a preemption provision expressly not preempting certain state laws”); *Stenehjem v. Freeeats.com, Inc.*, 712 N.W.2d at 837 (“Rather, the federal act includes a provision explicitly stating that such state laws are *not* preempted by the TCPA.”) (Emphasis original.). The FECA does not similarly limit preemption of State law, and is intended to occupy the field as to the conduct of Federal campaigns. It is the FECA, and its express preemption provision, which is at issue in this advisory opinion.

1 political committee. Indeed, Wyoming has indicated in comments submitted by its  
2 Attorney General that its law would apply to Federal political committees.

3       According to Requestor, the pre-recorded phone calls will expressly advocate the  
4 election or defeat of clearly identified federal candidates and/or solicit contributions to  
5 American Future Fund. The payments by American Future Fund for pre-recorded  
6 telephone calls that expressly advocate the election or defeat of a clearly identified  
7 Federal candidate constitute independent expenditures under the Act. 2 U.S.C. 431(17).  
8 Both the Arkansas and Wyoming statutes prohibit Federal political committees, such as  
9 American Future Fund, from using ADAD technology to make expenditures - one of the  
10 areas explicitly regulated by the Act and Commission regulations. Under the Act's  
11 preemption clause, and the Commission's implementing regulations, only Federal law  
12 can limit the ability of a Federal political committee to make expenditures. 2 U.S.C.  
13 453(a) ("The provisions of this Act, and of rules prescribed under this Act, supersede and  
14 preempt any provision of State law with respect to election to Federal office."); 11 C.F.R.  
15 108.7(b)(3) ("Federal law supersedes State law concerning the... [l]imitation on  
16 contributions and expenditures regarding Federal candidates and political committees.").

17       To the extent that the laws of Arkansas and Wyoming purport to prohibit such  
18 pre-recorded telephone calls by Federal political committees that expressly advocate the  
19 election or defeat of a clearly identified federal candidate, they are preempted. Moreover,  
20 the application of the laws of Arkansas and Wyoming to pre-recorded telephone calls that  
21 contain express advocacy and that also solicit contributions to America Future Fund

(which, presumably, will include all solicitations) are preempted as they are, in effect, expenditure limits.<sup>7</sup>

This conclusion is consistent with past Commission Advisory Opinions. For example, in Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission examined a State law that banned Federal candidates and committees from paying for certain polling expenses. The Commission concluded that because the statute limited expenditures regarding Federal elections (rather than regulating “those areas defined as interests of the State”), the West Virginia law was preempted by the Act and Commission regulations.

Moreover, with respect to American Future Fund’s proposed phone calls, the Arkansas and Wyoming statutes do not address any of the Federal election-related areas that Congress intended to leave exclusively to the jurisdiction of the States (e.g., voter fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3). Accordingly, with respect to American Future Fund’s proposed phone calls that expressly advocate the election or defeat of a clearly identified federal candidate, the Arkansas and Wyoming statutes prohibiting pre-recorded phone calls by political committees are preempted by the Act and Commission regulations. 2 U.S.C. 453; 11 CFR 108.7(b)(3).

2. *Are certain State laws requiring a Federal political committee to obtain prior consent, specifically through the use of a live operator, prior to delivery of a pre-recorded telephone call preempted by FECA?*

The laws of California, Indiana, Minnesota, Mississippi, Montana, New Jersey,

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<sup>7</sup> See *FEC v. EMILY’s List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009) (striking a Commission regulation styled as a contribution limit that in effect functioned as a spending limit). See also *Buckley v. Valeo*, 424 U.S. 1 (1976).

1 North Carolina, North Dakota, South Carolina, and Tennessee require a Federal political  
2 committee to obtain prior consent, specifically through the use of a live operator, before  
3 delivery of a pre-recorded telephone call. These laws, when applied to independent  
4 expenditures by Federal committees, are preempted by FECA because they are  
5 expenditure limitations. As the Supreme Court has explained, “a restriction on the  
6 amount of money a person or group can spend on political communication during a  
7 campaign necessarily reduces the quantity of expression by restricting the number of  
8 issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>8</sup>

9 Under the Act’s preemption clause, and the Commission’s implementing  
10 regulations, only Federal law can limit the ability of a Federal political committee to  
11 make expenditures of the sort at issue here. 2 U.S.C. 453(a) (“The provisions of this Act,  
12 and of rules prescribed under this Act, supersede and preempt any provision of State law  
13 with respect to election to Federal office.”); 11 C.F.R. 108.7(b)(3) (“Federal law  
14 supersedes State law concerning the... [l]imitation on contributions and expenditures  
15 regarding Federal candidates and political committees.”). Moreover, the Commission has  
16 long recognized that the Act preempts State and local laws requiring political committees  
17 to include certain content in their communications.<sup>9</sup>

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<sup>8</sup> *Buckley*, 424 U.S. at 19. See also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (reiterating that non-profit advocacy groups are generally entitled to raise and spend unlimited money on elections).

<sup>9</sup> See, e.g., Advisory Opinion 1978-24 (Sonneland), where the Commission concluded that given “stated Congressional intent that the Act preempt State law as to required disclosures in conducting political campaigns for Federal office,” the provisions of 2 U.S.C. 435(b) and 441d would supersede and preempt the cited State statute requiring designation of party affiliation on all campaign advertising. Similarly, in Advisory Opinion 1981-27 (Archer), the Commission concluded that a city ordinance that required the inclusion of an anti-littering “warning” in all political campaign materials placed, posted or erected within the city’s limits would exceed the Act’s disclosure requirements at 2 U.S.C. 441d and 11 CFR 110.10. The Commission observed, however, that state statutes that apply to the placement and location of campaign advertisements are outside the purview of the preemption provision of 2 U.S.C. 453. In Advisory Opinion

1       The laws of California,<sup>10</sup> Indiana, Minnesota, Mississippi,<sup>11</sup> Montana, New  
2       Jersey, North Dakota, and South Carolina each require the caller to obtain the consent, by  
3       various manners including a live operator, for pre-recorded telephone calls, including  
4       those calls made by Federal political committees.

5       Cal. Pub. Util. Code 2872 – 2874 permits an ADAD-placed call, unless  
6       previously agreed to by the persons involved, to be completed “only after an unrecorded,  
7       natural voice announcement has been made to the person called by the person calling.”  
8       None of the exceptions to California’s prohibition on ADAD calls appear to explicitly  
9       apply to Federal political committees. Moreover, the California Public Utilities  
10      Commission has indicated, both on its website and through its comments in response to  
11      this advisory opinion request, that California’s law would apply to Federal political  
12      committees. *See* California Public Utilities Commission: When are Robocalls Legal?,  
13      [ftp://ftp.cpuc.ca.gov/cei/080129\\_robocalladad\\_faq.pdf](ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf).

14      Likewise, Ind. Code 24-5-14-5, 24-5-14-7 states that a caller may not connect to a  
15      telephone line using ADAD unless “the subscriber has requested, consented to, permitted,  
16      or authorized receipt of the message; or . . . the message is immediately preceded by a  
17      live operator who obtains the subscriber’s consent.” Comments on this advisory opinion  
18      request submitted by the Indiana Attorney General state that its law applies to all ADAD  
19      calls and that it is currently enforcing the law against two entities that made political calls

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1986-11 (Mueller), the Commission determined that a State law requiring that a candidate’s campaign logo include either the word “elect” or “for” was preempted, applying the reasoning in Advisory Opinions 1978-24 (Sonneland) and 1981-27 (Archer).

<sup>10</sup> The California statute is also the subject of Question 4, below.

<sup>11</sup> The Mississippi statute is also the subject of Question 4, below.

1 using ADAD. *See State of Indiana v. Economic Freedom Fund, et al.*, Brown Circuit  
2 Court, Cause No. 0-C01-0609-MI-0425 and *State of Indiana v. American Family Voices,*  
3 *et al.*, Harrison Circuit Court, Cause No. 31C01-0609-MI-78.

4 Minn. Stat. 325E.27, 325E.29 uses language similar to the Indiana statute and  
5 prohibits ADAD calls unless the subscriber has voluntarily consented to receive such  
6 calls or the call is preceded by a live operator who obtains consent. As indicated in this  
7 advisory opinion request, Minnesota's law has been applied to Federal political  
8 committees during the 2004 presidential election. In addition, Minnesota, through  
9 comments submitted by its Attorney General, has indicated that the Minnesota law would  
10 apply to Federal political committees.

11 Miss. Code 77-3-455 allows ADAD to be used only pursuant to a prior agreement  
12 between the persons involved, or when the ADAD is operated by a person who obtains  
13 the informed consent of the subscriber to hear the prerecorded message. Mississippi has  
14 indicated, through comments submitted by its Public Service Commission, that its law is  
15 general in nature and applicability. Given the general applicability of these requirements,  
16 it appears that Mississippi's law would apply to Federal political committees.

17 Mont. Code 45-8-216 prohibits the use of ADAD for a political campaign unless  
18 the permission of the called party is obtained by a live operator before the recorded  
19 message is delivered. The Montana law explicitly states that ADAD may not be used for  
20 the purpose of "promoting a political campaign or any use related to a political  
21 campaign." This language indicates that the Montana law could be applied to a Federal  
22 political committee.

23 N.J. Stat 48:17-28 states that a caller may not contact a subscriber to deliver a

1 recorded message “unless the recorded message is introduced by an operator who shall  
2 obtain the subscriber’s consent before playing the recorded message, or unless a prior or  
3 current relationship exists between the caller and the subscriber.” Without any applicable  
4 exemptions or limitations, this language of the New Jersey statute could be applied to a  
5 Federal political committee.

6 N.D. Code 51-28-02 – 51-28-04 also uses language similar to Indiana and  
7 Minnesota’s statutes, requiring either prior consent or a live operator to obtain consent.  
8 North Dakota’s comments, submitted by its Attorney General, indicate that its statute  
9 would apply to Federal political committees.

10 S.C. Code 16-17-446 prohibits an ADAD call unless it is in response to the  
11 express request of the person called, or in response to a person with whom the caller has  
12 or has had a previous business relationship. The language of the South Carolina statute  
13 could be applied to a Federal political committee.

14 The laws of North Carolina and Tennessee also require prior approval for the use  
15 of ADAD, although these laws restrict the use of ADAD in a more limited manner than  
16 previously discussed statutes. N.C. Gen Stat 75-104 prohibits most ADAD calls, but  
17 permits a “political party or political candidate” to make a call, no part of which is used  
18 to make a solicitation. However, N.C. Gen Stat 75-104(b)(2) permits ADAD solicitations  
19 by Federal political committees if a live operator obtains approval. The North Carolina  
20 Attorney General’s comments on this advisory opinion request assert that this provision  
21 would be easily complied with by American Future Fund and cites to the language of the  
22 North Carolina statute that permits some use of ADAD calls by Federal political  
23 committees. Nonetheless, the language of the statute prohibits solicitations by Federal

1 political committees such as American Future Fund using ADAD without the use of a  
2 live operator.

3 Tenn. Code 47-18-1502 states that “[i]t is unlawful for any person to use, to  
4 employ, or direct another person to use, or to contract for the use of ADAD  
5 equipment . . . for the purpose of conducting polls or soliciting information,” except when  
6 prior consent is obtained. Thus, the language of the Tennessee statute applies to Federal  
7 political committees for these narrow purposes.

8 The ten State statutes at issue constitute a limitation on American Future Fund’s  
9 independent expenditures. Although not a complete ban like the laws discussed above,  
10 the use of a live operator is substantially more expensive than ADAD,<sup>12</sup> and there is no  
11 comparable alternative in terms of “impact and effectiveness.” The practical effect is an  
12 expenditure limitation.<sup>13</sup> As the Supreme Court explained, “[b]eing free to engage in  
13 unlimited political expression subject to a ceiling on expenditures is like being free to  
14 drive an automobile as far and as often as one desires on a single tank of gasoline.”<sup>14</sup> In

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<sup>12</sup> This issue was noted by a commenter, who also provided a compelling real-life example: If a live operator were used just to introduce a call, it would require 2,000 employees for 25 hours to place one million calls just one time. The cost of the operators alone would exceed \$2 million, which is 1500% more than using an automated system. AO 2009-27 (American Future Fund), Comments of ccAdvertising (Dec. 8, 2009) at 5.

<sup>13</sup> See *FEC v. Wisconsin Right to Life (“WRTL”)*, 551 U.S. 449, 447, n.9 (2007) (In striking down BCRA’s prohibition on the use of corporate general treasury funds to finance “electioneering communications” during pre-federal-election periods when applied to its issue-advocacy advertisements, the majority noted that, “the response that a speaker should just take out a newspaper ad, or use a website, rather than complain it cannot speak through a broadcast communication... is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication had relevance in determining that permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of *impact and effectiveness*.” (emphasis added)).

<sup>14</sup> *Buckley*, 424 U.S. at 19, n.18 (1976). Similarly, the Court rejected the argument that BCRA’s challenged electioneering communication provision did not amount to a limitation on a corporation’s free speech rights because of the availability of the so-called “PAC alternative.” *WRTL*, 551 U.S. at 447, n.9 (2007) (“the



1 other words, the prohibition on the use of ADAD under these laws amounts to a  
2 categorical prohibition – an expenditure limitation – not merely a time, place and manner  
3 restriction.<sup>15</sup> Thus, the ten State statutes operate as expenditure limits, and as discussed  
4 above, the regulation of expenditures is preempted by FECA.

5 Moreover, none of the ten State statutes at issue specify the precise words that  
6 must be used to obtain the consent of the person called, and these State requirements to  
7 obtain consent compel Federal political committees to include certain content in their  
8 campaign communications. Further, the California, Indiana, Minnesota, Mississippi,  
9 Montana, New Jersey, North Carolina, North Dakota, South Carolina, and Tennessee  
10 statutes do not address any of the Federal election-related areas that Congress intended to  
11 leave exclusively to the jurisdiction of the States (*e.g.*, voter fraud, ballot theft, ballot  
12 qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101  
13 and 11 CFR 108.7(b)(3). Accordingly, like the statutes considered in Advisory Opinions  
14 1978-24 (Sonneland), 1981-27 (Archer) and 1986-11 (Mueller), the California, Indiana,  
15 Minnesota, Mississippi, Montana, New Jersey, North Carolina, North Dakota, South  
16 Carolina, and Tennessee statutes are preempted by the Act and Commission regulations.  
17 2 U.S.C. 453; 11 CFR 108.7(b)(3).

18 3. *Is Iowa State law purporting to prohibit Federal political committees*  
19 *from engaging in fundraising via pre-recorded telephone calls*  
20 *preempted by FECA?*  
21

22 Yes, the Iowa law purporting to prohibit Federal political committees from

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dissent overstates its case when it asserts that the ‘PAC alternative’ gives corporations a constitutionally sufficient outlet to speak.”). *Accord EMILY’s List*, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009).

<sup>15</sup> *See Buckley*, 424 U.S. at 18 (distinguishing contribution and expenditure limits from time, place, and manner restrictions, because contribution and expenditure limits “impose direct quantity restrictions on political communication and association”).

1 engaging in fundraising via pre-recorded telephone calls is preempted by FECA if the  
2 pre-recorded telephone calls expressly advocate the election or defeat of a clearly  
3 identified federal candidate.

4 Iowa's statute prohibits ADAD calls for fund-raising, with exceptions not  
5 applicable here. *See* Iowa Code 476.25. According to Requestor, the pre-recorded phone  
6 calls will solicit contributions and/or expressly advocate the election or defeat of a clearly  
7 identified federal candidate. Under FECA, an "independent expenditure" is defined as  
8 "an expenditure by a person expressly advocating the election or defeat of a clearly  
9 identified candidate" and that is not coordinated. 2 U.S.C. 431(17). Thus, to the extent  
10 that the calls contain express advocacy, the Iowa statute would restrict independent  
11 expenditures by Federal political committees,<sup>16</sup> and therefore is preempted under  
12 2 U.S.C. 543(a) and 11 CFR 108.7(b)(3).

13 4. *Are certain State laws purporting to require Federal political*  
14 *committees to include additional disclaimers on pre-recorded*  
15 *telephone calls preempted by FECA?*  
16

17 Yes, the laws of California, Mississippi, New York, and Pennsylvania purporting  
18 to require Federal political committees to include additional disclaimers on pre-recorded  
19 telephone calls are preempted by FECA.

20 Cal. Pub. Util. Code 2874(a)(1) requires that any ADAD call include an  
21 announcement that states the nature of the call and the name, address, and telephone  
22 number of the business or organization being represented, if any. California's Public  
23 Utilities Commission has indicated in its comments that, like the state's requirement to

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<sup>16</sup> The First Amendment prohibits any limits on how much money an independent political committee can spend on independent expenditures. *See WRTL*, 551 U.S. 449.

1 obtain prior approval to send ADAD messages, California's disclaimer requirement  
2 would apply to Federal political committees. *See also* California Public Utilities  
3 Commission: When are Robocalls Legal? [ftp://ftp.cpuc.ca.gov/cei/](ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf)  
4 [080129\\_robocalladad\\_faq.pdf](ftp://ftp.cpuc.ca.gov/cei/080129_robocalladad_faq.pdf).

5 Miss. Code 77-3-455(2) is identical to California's disclaimer requirement in that  
6 it requires an ADAD call to state the nature of the call and the name, address, and  
7 telephone number of the business or organization being represented. Mississippi has  
8 indicated, through comments submitted by its Public Service Commission, that its law is  
9 general in nature and applicability. It appears therefore that Mississippi's law would  
10 apply to Federal political committees.

11 The New York statute at issue requires ADAD-placed calls to state at the  
12 beginning of the call the nature of the call and the name of the person on whose behalf  
13 the message is being transmitted and at the end of the message the address and telephone  
14 number of the person on whose behalf the message is transmitted. N.Y. Gen Bus. 399-p.  
15 That statute defines a "person" as "any natural person, firm, organization, partnership,  
16 association or corporation, or other entity, whether for-profit or not-for-profit." *Id.* This  
17 language indicates that the New York law could be applied to a Federal political  
18 committee.

19 Pennsylvania requires an ADAD-placed call "to begin with, or be preceded by, a  
20 statement announcing the name, address and call-back telephone number of the calling  
21 party, the nature of the ensuing message, and the fact the message is a recording." 52 Pa.  
22 [Admin.] Code 63.60. The Pennsylvania law appears to apply to all ADAD calls placed  
23 through public utilities in the state. 52 Pa. [Admin.] Code 63.60(b). As such, the

1 language of the statute indicates that the Pennsylvania law could be applied to a Federal  
2 political committee.

3 California, Mississippi, New York, and Pennsylvania each require an additional  
4 disclaimer on pre-recorded telephone calls, including those made by Federal political  
5 committees. This area is regulated by the Act and Commission regulations. 2 U.S.C.  
6 453; 11 CFR 108.7(b)(3).<sup>17</sup> Accordingly, the Commission has long recognized that the  
7 Act preempts State and local laws requiring disclaimers that must appear on  
8 advertisements or solicitations, treating such disclaimers as related to the issues of  
9 disclosure and “the conduct of Federal campaigns.” *See* Advisory Opinion 1978-24  
10 (Sonneland); Advisory Opinion 1981-27 (Archer); Advisory Opinion 1986-11 (Mueller).

11 Therefore, with respect to America Future Fund’s proposed phone calls, the  
12 statutes of California, Mississippi, New York, and Pennsylvania, to the extent they  
13 require additional disclaimers, are expressly preempted by the Act and Commission  
14 regulations. 2 U.S.C. 453; 11 CFR 108.7(b)(3).

15 This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
18 of the facts or assumptions presented and such facts or assumptions are material to a  
19 conclusion presented in this advisory opinion, then the requester may not rely on that  
20 conclusion as support for its proposed activity. Any person involved in any specific  
21 transaction or activity which is indistinguishable in all its material aspects from the

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<sup>17</sup> The California, Mississippi, New York, and Pennsylvania statutes do not address any of the Federal election-related areas that Congress intended to leave exclusively to the jurisdiction of the States (*e.g.*, voter fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3).

1 transaction or activity with respect to which this advisory opinion is rendered may rely on  
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
3 conclusions in this advisory opinion may be affected by subsequent developments in the  
4 law including, but not limited to, statutes, regulations, advisory opinions and case law.  
5 The cited advisory opinions are available on the Commission's website at  
6 <http://saos.nictusa.com/saos/searchao>.

7 On behalf of the Commission,  
8  
9

10  
11 Matthew S. Petersen  
12 Chairman